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80-1821

NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

OLEN JERRY WEAVER,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

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QUESTION PRESENTED

1. Was the comment by the State Prosecuting Attorney on the Petitioner's Fifth Amendment right to testify or not in his own behalf during voir dire examination of the jury harmless error in this case?

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

OPINION BELOW

The opinion of the Arkansas Court of Appeals is reported at 271 Ark. 853 (February 4, 1981) (Advance sheets). The opinion is set forth in Appendix "A" to this Petition.

JURISDICTION

The final order of the Arkansas Court of Appeals was entered February 4, 1981 and Petition for Rehearing was denied, March 11, 1981, affirming the judgment of the Sebastian County Circuit Court sentencing Petitioner to

four years in the Department of Corrections and assessing a fine of $2,500.00 on the offense of sexual abuse in the first degree. Notice of filing for Writ of Certiorari to review was filed in the Arkansas Court of Appeals on February 19, 1981. A motion to stay the mandate of the Arkansas Court of Appeals and to remain on bond was filed in the Arkansas Court of Appeals on February 19, 1981. On March 11, 1981, the Arkansas Court of Appeals entered an order granting Petitioner's motion to stay the mandate and to remain on bond.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitutional Provisions involved are Amendments 5 and 14 and can be found in U.S.C.A., Constitution, Amendments 5 and 14, page 223.

Amendment 5 provides as follows:

> No person * * * shall be compelled in any criminal case to be witness against himself, * * *.

Amendment 14 provides as follows:

> * * * No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On February 7, 1980, Petitioner was charged by Information with the offense of rape (Class "A" Felony) in violation of *Ark. Stat. Ann.* Section 41-1803. It was alleged that on July 24, 1979, the Petitioner engaged in deviate sexual activity with an eight year old girl.

Prior to the filing of the Information in Sebastian County Circuit Court, the charge was filed in the Fort Smith Municipal Court and a preliminary hearing was held on February 5, 1980. The alleged victim, Donna Jetton, an eight year old girl, and her mother Jo Ann Jetton testified at the preliminary hearing. After their testimony, the Municipal Court found that the evidence was sufficient to hold Petitioner in custody or under bond to await a jury trial in Circuit Court.

The first trial of this cause was held on April 1, 1980. Donna Jetton and Jo Ann Jetton testified for the State. The petitioner testified and presented two witnesses, his employers, Dorothy and G. C. (Doc) Cecil. These witnesses presented the defense of alibi. The jury was unable to agree on a verdict and the trial court declared a mistrial.

On June 5-7, 1980, a second jury trial was held. During voir dire examination of the jury, the Prosecuting Attorney, when questioning a prospective juror, Mrs. Grace Anderson, commented that the case basically boiled down to the testimony of an eight year old girl and the adult defendant. She was the second prospective juror to be questioned by the parties and her examination was conducted in the presence of the rest of the panel. (R. 120)

The Petitioner immediately moved for a mistrial on the ground that the State was commenting on the defen-

dant's right to testify or not in his own behalf. The motion for a mistrial was denied by the trial court over the exceptions of the Petitioner. (R. 120-121)

Donna Jetton, an eight year old girl, the alleged victim, testified that the defendant asked her to go to the liquor store in his vehicle, took her to the river, slapped her, and rubbed the outside of her private parts with his finger. She testified that he did not penetrate her vagina with his finger and said that she told her mother that he only rubbed her and did not penetrate her. She stated that in her testimony at the preliminary hearing and in the first trial (a mistrial) that she testified that he only rubbed her private parts.

Jo Ann Jetton, the mother of the alleged victim, testified that her daughter came into the kitchen and told her upon questioning, about the incident and also told her that the defendant placed his finger in her private place.

This witness had also testified at the preliminary hearing and the first trial to the same effect.

After the State rested the Petitioner moved for a directed verdict and that the charge of rape be dismissed because the victim testified there had been no penetration. On the same ground he also moved that the charge be reduced to sexual abuse in the first degree (*Ark. Stat. Ann.* Section 41-1808, Class "D" felony). The motions were overruled by the trial court even though the evidence reflected no penetration of th evictim's private parts.

The Petitioner called several witnesses in his defense. Two of these were his employers at the time of the alleged offense, Dorothy and G. C. (Doc) Cecil. They testified that on the day of the alleged offense and a couple days there-

after the Petitioner was at work for them before he left for the Memphis, Tennessee area. In other words, they presented the defense of alibi as they had in the first trial.

Then, Petitioner's attorney called the Petitioner to take the stand in his own defense and to testify in his own behalf. This was done after Petitioner's attorney stated that he was doing so because Petitioner was being coerced into testifying because of the Prosecutor's comments and without waiving his motion for a mistrial. Counsel stated that part of the reason he was calling Petitioner to testify was because of the comment of the Prosecuting Attorney. Petitioner's attorney also stated that, "It may very well have been that had it not been for the remark we would have had a different strategy in this case and may not have put him on and I want to preserve my motion for mistrial I made". (R. 725-726)

The Petitioner testified that he was at work on the day of the alleged offense and could not have committed the offense. He further testified that he worked a couple more days and then left for Memphis. This was same as his testimony at the first trial.

At the second trial the State presented a rebuttal witness, Sam Steiling, of Memphis Gateway Plaza, West Memphis, Arkansas. He did not testify at the first trial. He testified that the Petitioner applied for a job with him on the next day after the alleged offense and produced a job application form to buttress his testimony. The State's purpose in offering this testimony was to show flight of the Petitioner after the offense.

After the close of the testimony the Petitioner renewed his motion for a directed verdict, that the charge of

rape be dismissed, and that the charge be reduced to sexual abuse in the first degree. The motions were again overruled and the trial court submitted the issues of rape and the lesser included offense of sexual abuse in the first degree to the jury in its instructions to the jury. (R. 850-852)

The jury found the Petitioner guilty of the lesser included offense of sexual abuse in the First Degree and fixed his punishment at four years in the Department of Corrections and a fine of $2,500.00 (*Ark. Stat. Ann.* Sections 41-901 and 41-1101). On July 1, 1980, judgment was entered on the verdict and the Petitioner was so sentenced.

Petitioner appealed the judgment to the Arkansas Court of Appeals. He argued that the trial court erred in overruling his motion for a mistrial during voir dire examination of juror Grace Anderson because the State commented on his right to testify or not testify in his own behalf.

On February 4, 1981, the Arkansas Court of Appeals delivered its opinion and decision affirming the judgment of the Sebastian County Circuit Court. It held that the Prosecuting Attorney's comment violated his right not to testify under the Fifth Amendment to the United States Constitution but that it was a harmless error.

On February 23, 1981, Petitioner petitioned the Arkansas Court of Appeals for a rehearing. On March 11, 1981, that Court denied the petition for rehearing and stayed its mandate.

Petitioner now petitions this Court for a Writ of Certiorari to review the final order and judgment of the Arkansas Court of Appeals.

ARGUMENT

Petitioner believes that the question presented is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of the question. The reasons why the question presents a substantial federal question is set out below.

The petitioner contended in the Arkansas Court of Appeals that his Fifth Amendment right was violated by the Prosecuting Attorney's comment on his right to testify during voir dire examination of the jury. As authority he cited the Fifth and Fourteenth Amendments to the United States Constitution, Article 2, Section 8 of the Arkansas Constitution and the cases of *Adams v. State*, 263 Ark. 536, 566 S.W.2d 387 (1978), and *Clark v. State*, 256 Ark. 658, 509 S.W.2d 812 (1974). He further argued that the comment by the Prosecuting Attorney was calculated to call the jury's attention to his right to testify or not and had the effect of coercion on this right.

It is well settled that comment on the failure of a defendant to testify in a criminal case is violative of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution which is applicable to the States by the Fourteenth Amendment to the United States Constitution. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1965); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The guarantee or privilege against self-incrimination must be accorded liberal construction in favor of the right it was intended to secure. *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964 (1955).

The Arkansas Court of Appeals cited *Griffin, supra* and held that the Prosecutor's remark was a comment on the Petitioner's right to testify or not. However, it held that the comment and the trial court's refusal to declare a mistrial was harmless error, cited as its authority *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and refused to reverse the conviction.

Chapman, supra also held that before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. In the context of the facts of this case, this comment was much more than harmless error. It was prejudicial constitutional error and the conviction should be set aside and a new trial ordered. The facts to support this statement will be set out below.

To further buttress Petitioner's argument that this was not harmless error, the Arkansas Court and most courts have a rule that error will be presumed to be prejudicial in the absence of an affirmative showing to the contrary and the judgment reversed. *Kerr v. State,* 256 Ark. 738, 512 S.W.2d 13 (1974); *Shelton v. State,* 261 Ark. 816, 552 S.W.2d 216 (1977). This error should be presumed to be prejudicial and the State and the Court has not been able to affirmatively show that it is not.

Chapman says that a constitutional violation may be harmless error where the State can show that it did not contribute to the verdict or that there was no reasonable possibility that the comment might have contributed to the verdict. It also held that in determining the above that a court should examine the strength of the evidence and the nature and extent of the comment.

As was said before, in the context of the facts of this case and the verdict both as to guilt or innocence and the amount of punishment assessed (one year less than the maximum) by the jury that the constitutional error was not harmless.

1. Strength of the evidence. (a) The evidence in this case was weak. The credibility of the victim and her mother was severely attacked by the Petitioner on cross-examination. In fact, the State impeached its own witness, the victim, Donna Jetton, with the testimony of her mother Jo Ann Jetton. The victim testified that there was no penetration of her vagina by Petitioner's finger. The mother testified that the victim told her he did penetrate her with his finger. This was true impeachment of one's own witness. The credibility of the victim was severely tested. She admitted that she told her mother a lie and that she changed her story. (R. 342-343) The mother's credibility was tested in that it showed bias on her part because Petitioner had left her for another woman. Without the comment on Petitioner's Fifth Amendment right, Petitioner might have let the case go to the jury without offering any testimony at all. He could avoid not testifying and avoid subjecting himself to cross-examination. He could have left the case in the posture of going to the jury with the testimony of the alleged victim and her mother. At this point, the case was in good posture over the credibility of the witness. The Petitioner could have argued to the jury the inconsistencies of the testimony of the mother versus the daughter concerning penetration, her condition when she told her mother the story, and the lie she told her mother. He could have argued that the testimony showed bias,

prejudice, and vindictiveness on the mother's part and it showed that one or both was not telling the truth.

(b) The evidence the Petitioner presented, leaving out his testimony, was strong. His two employers testified that the petitioner was working on the day of the offense and for a couple of days thereafter. He also presented other good witnesses and evidence. This further weakened the State's case.

(c) The verdict of the jury reflects the weakness of the evidence. Petitioner's first jury trial resulted in a hung jury when the jury was unable to agree on guilt or innocence and a mistrial had to be declared. In the second trial the jury reduced the offense from rape which carries a 5 to 50 years or life sentence with $15,000.00 fine to sexual abuse in the first degree with a zero to five year sentence and $10,000.00 fine. Do these findings show that the evidence was strong? It shows to the contrary that the evidence was weak and the jury compromised the verdict.

2. The nature and extent of the comment. The Prosecutor said the case boiled down to the testimony of the victim and the defendant. The comment cried out to the jury the need for the defendant to testify. Without it, he could have and should have refused or declined to testify. The context of the facts of the case reflect that this was prejudicial. (a) The credibility of the State's witness was impeached and attacked. (b) Petitioner's alibi was established and fixed by his employers, Dorothy and G. C. (Doc) Cecil. They testified that he worked that day and a couple of days thereafter. This put the case in a good posture to go to the jury on credibility and alibi in the absence of the prejudicial comment on the Fifth Amendment right by the Prosecuting Attorney.

However, this comment coerced the Petitioner into testifying and wrecking his strategy and ruined his case. In the first trial the mother and daughter testified substantially the same. The Petitioner presented the same alibi witness at the first trial and the Petitioner testified. Therefore, from the first trial the State knew the details of the Petitioner's alibi testimony. He testified that he worked the day of the alleged offense and for a couple of days thereafter. Between the trials the State furnished, upon Petitioner's request, a list of witnesses for the second trial. (See Appendix "D" to this petition) On this list was the name of Sam Steiling, Memphis Gateway Plaza, West Memphis, Arkansas. The Petitioner knew what this witness was for. He was there as a rebuttal witness on the issue of flight after the offense. He was there to contradict Petitioner's first trial testimony that he worked a couple of days after the offense, hung around Fort Smith a few days, picked up his check and then left town. The witness testified in rebuttal of Petitioner's testimony that Petitioner applied for a job in the Memphis area the next day after this offense was allegedly committed. This showed flight to the prejudice of Petitioner's case and this testimony could never have been admitted in evidence except for the Petitioner's own testimony. Because of this knowledge of the witness Steiling, it was the intention and strategy of the defense for the Petitioner not to testify so that this evidence of flight would never reach the jury. This is further buttressed by the fact that the alibi defense was complete without the Petitioner's testimony. The alibi had been furnished by other witnesses and there was no need for Petitioner to testify except for the prejudicial comment of the Prosecutor. In other words, the Petitioner's own

testimony weakened his case when he tried to fight the Prosecutor's prejudicial comment.

In summary, the weak testimony of the State would not support a verdict for rape, the comment by the Prosecutor caused Petitioner to alter his strategy and testify, the testimony of the Petitioner weakened his alibi defense, and in this weakened posture it caused the jury to find him guilty of a lesser offense instead of acquit him, and caused the jury verdict on punishment to be one year less than the maximum. This clearly shows that the comment contributed to the verdict on guilt or innocence and also contributed to the verdict of punishment in that he was given one year less than the maximum.

This case involves an important and substantial issue. It is substantial because since *Chapman*, States continue to erode away State defendant's Fifth Amendment rights under the guise of harmless error and this practice should be stopped. This Court should look at this case and determine if the error is harmless or not and, if not, stop this practice of prosecutors commenting on this important right of a defendant. It is important that this case be accepted for decision because an important federal question of violation of Fifth Amendment rights of a petitioner in this type of situation is present and urgently calls for resolution.

CONCLUSION

Petitioner submits that for the above reasons the petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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Appendix

APPENDIX "A"

IN THE ARKANSAS COURT OF APPEALS

OLEN JERRY WEAVER

VS.

STATE OF ARKANSAS

NO. CA CR 80-73

Opinion Delivered February 4, 1981

TOM GLAZE, *Judge*

The appellant, Olen Weaver, was convicted of first degree sexual abuse and the jury imposed a penalty of four years in the Arkansas Department of Corrections and a $2,500 fine. Weaver raises three points for reversal.

First, it is argued by Weaver that the trial court erred in overruling his motion for a mistrial when, during *voir dire* examination of a juror, the prosecutor stated:

> This case involves, basically it boils down to the testimony of a little girl who was eight years old at the time of the offense, and of course, this adult who is sitting here is the Defendant. The fact that the girl, this little girl —

After the trial court overruled the motion for mistrial, the court gave a cautionary instruction to the jury to the effect that the prosecuting attorney would rephrase the last question, and that they should disregard the content of the last question. Weaver contends the prosecuting

attorney's comment violated his right not to testify under the Fifth Amendment to the United States Constitution, and because of the comment, he was compelled to testify. We disagree with this contention.

The law is settled that comment on the failure of a defendant to testify in a criminal case is a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution which is applicable to the States by the Fourteenth Amendment. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1969). It is also clear that seeming violations may be harmless error where the State can show that did it not contribute to the verdict or that there was no reasonable possibility that the comment might have contributed to the verdict. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In the *Chapman* case, the Court held that to determine whether a comment contributed to the verdict, the reviewing court must examine: (1) the strength of the evidence, and (2) the nature and extent of the comment.

In applying these criteria to the case at bar, we conclude that the evidence before the jury was substantial even if we were to limit our review to the testimony of the victim, Donna. Our Supreme Court has held that no corroboration of the victim's testimony is necessary in a case involving an alleged sex offense. *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980).

Donna related to the jury how Weaver took her pants and shorts off, that he put his hand on her vagina and that he rubbed her from side to side. In addition to Donna's testimony, we also examine the testimony given by her mother, who substantiated Donna's version of what Weaver had done soon after the encounter occurred. Moreover,

another witness called by the State testified that Weaver was in Donna's house on the day of the crime.

The second criteria required by *Chapman* is the most important when we review the comment made on *voir dire*. After examining the statement made by the prosecuting attorney, it is difficult to understand how it prejudiced Weaver or, indeed, caused Weaver to feel he was in any way compelled to testify. To consider the prosecutor's remarks in their proper context, we must review the questions, answers and comments before and after the challenged comment:

[BY THE DEPUTY PROSECUTING ATTORNEY:]

Q. I see from your jury questionnaire that you have four children.

A. Right.

Q. How old are they?

A. I have a 19-year old, 16-year old, 10-year old — I'm sorry, I forgot the oldest. I have one that is 20.

Q. This case involves, basically it boils down to the testimony of a little girl who was eight years old at the time of the offense, *and of course, this adult who is sitting here is the Defendant.* The fact that the girl, this little girl —

* * *

THE COURT: The Deputy Prosecuting Attorney will rephrase the last question and you will disregard the content of the question that he just asked.

A. Yes, sir.

Q. The State intends to call as a witness an eight year old girl who was the victim of this offense. The fact that she is eight years old in and of itself, would that cause you to disbelieve anything that she would have to say; just the sole basis of her age?

A. I don't think so.

Q. Of course, you would have to hear all the evidence and hear all — I understand you would have to hear everything she had to say and everything all the other witnesses that might testify would have to say, but just because of her age you would not hold that against her and feel she was not worthy of belief?

A. (Nods head in negative.)

[Emphasis supplied.]

From the colloquy above, one clearly discerns the sole purpose of the prosecuting attorney's remarks was to elicit the juror's expressed intentions on whether the juror would believe an eight year old girl's testimony. There was no reference by the prosecutor to Weaver's testimony or possible testimony. Rather, the prosecutor merely identified Weaver to the juror as the adult Defendant. The prosecutor then immediately proceeded to inquire whether the fact the little girl is eight years old would cause the juror not to believe what she would have to say. If we were to conclude (as Weaver suggests) that the prosecutor's statement was a comment on Weaver's right to remain silent, we would be constrained not only to take the prosecutor's statement out of context, but we also would be forced to give the words used a meaning different than that commonly understood and intended. After a review of the

prosecuting attorney's *voir dire* of all jurors, we are convinced beyond a reasonable doubt that the prosecutor's comment was harmless.

The next argument of Weaver's is that the trial court committed error when it allowed the mother to testify to information that she gained from Donna shortly after the offense occurred. This issue is controlled by our Supreme Court's decision in *Burris v. State*, 265 Ark. 604, 580 S.W.2d 204 (1979). In *Burris*, the prosecutrix testified Burris forced her into her apartment and raped her. She managed to escape and ran to a neighbor's house and called the police. A police officer answered the call and later testified at trial that the prosecutrix was "very hysterical" and it took a few minutes to calm her down. The officer testified further that she then said that she had been raped by Burris. The prosecutrix also called her brother within fifteen or twenty minutes after the occurrence. The brother also testified at trial that she sounded "really hysterical," and he stated that she finally said that she had been raped by Burris. The Court in the *Burris* case held that the prosecutrix's experience had been a "startling event," that she was still under the stress of excitement when she made the statements to the officer and her brother and these statements were admissible as an excited utterance pursuant to Rule 803(2) of the *Uniform Rules of Evidence*.

The evidence in the record before us is comparable to, if not stronger than, that presented in *Burris*. Here, we have an eight year old girl who related that Weaver had hit her, undressed her, rubbed her vagina and took out his "private place." He also told her to lie to her mother when she returned home. After Weaver let her out of his car, Donna went home, told her mother the lie that Weaver

told her to tell, and when she did, Donna broke down crying and she then told the truth. As was true in *Burris*, we consider and view the above facts in light of Rule 803 (2) of the *Uniform Rules of Evidence*, which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

We have no problem in deciding that the mother's testimony which was based on her conversation with Donna is admissible as an excited utterance under Rule 803(2) above. Without question, Donna had undergone a startling event and continued in an extremely emotional state of mind when she discussed the event with her mother.

The third and last issue argued by Weaver is that the trial court erred in instructing the jury that he could be guilty of rape. The evidence in the record was in conflict and reflects that Donna denied that Weaver penetrated her vagina with his finger. However, Donna's mother testified at the trial that Donna told her that he had penetrated her. The court instructed the jury that Weaver could be guilty of rape, sexual abuse in the first degree, sexual solicitation of a child, or, of course, he could be found not guilty. The jury found him guilty of first degree sexual abuse. Weaver contends the evidence did not warrant an instruction on rape, and that the court in doing so prejudiced him by enhancing his punishment on the lesser included offense of sexual abuse in the first degree. In advancing this con-

tention, Weaver cites no authority and virtually no argument except that "it is common knowledge that prosecutors often overcharge and file a higher type offense when they know the jury will find a lesser included offense." We adopt the position taken by our Supreme Court in *Dixon v. State,* 260 Ark. 857, 545 S.W.2d 606 (1977), wherein it held:

> Assignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal, unless it is apparent without further research that they are well taken.

We feel the rule enunciated in *Dixon* is designed to dispose of the type assertion or contention as we have before us now. In view of our decision, it is unnecessary to consider the State's other arguments that Weaver failed to object to the rape instruction in the trial court proceeding and that any such objection was rendered moot when the jury convicted him on the lesser charge of sexual abuse.

For the foregoing reasons, we affirm the judgment.

AFFIRMED.

Corbin, J., not participating.

Cloninger, J., not participating.

APPENDIX "B"

IN THE ARKANSAS COURT OF APPEALS

OLEN JERRY WEAVER

vs.

STATE OF ARKANSAS

NO. CA CR 80-73

ORDER DENYING PETITION FOR REHEARING

The Arkansas Court of Appeals made the following orders today in the above styled case:

Petition for Rehearing is denied.

Motion to Stay Mandate and to Remain on Bond is granted.

/s/ Christy L. Scales,
Deputy Clerk

Letter dated March 11, 1981.

APPENDIX "C"

IN THE ARKANSAS COURT OF APPEALS

OLEN JERRY WEAVER

vs.

STATE OF ARKANSAS

NO. CA CR 80-73

NOTICE FOR FILING FOR WRIT OF CERTIORARI TO REVIEW

Comes the Appellant-Petitioner, Olen Jerry Weaver, and hereby gives notice of filing for Writ of Certiorari to review the final decision and opinion delivered on February 4, 1981 by the Arkansas Court of Appeals affirming the Judgment of the Sebastian County Circuit Court, dated June 7, 1980, and designates the entire Judgment, Opinion and Decision of the Arkansas Court of Appeals to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provisions of 28 U.S.C. Section 1257(3).

/s/ Robert S. Blatt
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Attorney for Appellant/
Petitioner

Filed on February 19, 1981.

APPENDIX "D"

IN THE ARKANSAS COURT OF APPEALS

OLEN JERRY WEAVER

vs.

STATE OF ARKANSAS

NO. CA CR 80-73

LIST OF WITNESSES LETTER DATED JUNE 2, 1980

The following is a list of witnesses the State expects to call in the above-styled case.

1. Detective Fran Brown — FSPD
2. Detective Larry Hammon — FSPD
3. Donna Jetton — No. 9 Ragon Homes
4. Joanne Jetton — No. 9 Ragon Homes
5. Jerry Jetton — 1310 So. 12th (782-6361)
6. June Watkins Townes — 3300 Neis or Branding Iron — 783-9335
7. Larry Kennon — S.O.
8. Ron Mix or his designee — Southwestern Bell Telephone
9. Sam Steiling — Memphis Gateway Plaza, West Memphis, AR 735-7076

/s/ David P. Saxon

Deputy Prosecuting Attorney